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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,
Petitioners,

v.

UNITED AIR LINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF LPA, INC., IN SUPPORT OF RESPONDENT

DANIEL V. YAGER *
McGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae LPA, INC.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Should courts defer to the EEOC Interpretive Guidance that disabilities should be analyzed in their uncorrected state?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE TYPE AND LEVEL OF DEFERENCE THAT SHOULD BE ACCORDED AN AGENCY SHOULD DEPEND ON WHETHER THE AGENCY IS ENGAGED IN DECIDING QUESTIONS OF PUBLIC POLICY OR QUESTIONS OF LAW	4
A. The *Chevron* Doctrine Should Apply Only to Agency Public Policy Determinations	7
B. The *Chevron* Doctrine Should Not Apply to Agency Interpretive Rules, General Statements of Policy, or Rules of Agency Organization, Procedure, or Practice	11
II. THE *CHEVRON* DOCTRINE SHOULD NOT APPLY TO THE EEOC INTERPRETIVE GUIDANCE AT ISSUE IN THIS CASE	16
III. THE EEOC INTERPRETIVE RULE AT ISSUE IN THIS CASE DESERVES LITTLE DEFERENCE UNDER THE *SKIDMORE* DOCTRINE	19
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

	Page
Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990)	9
Atchison, Topeka & Sante Fe Railway, 44 F.3d 437 (7th Cir 1994), *aff'd on other grounds*, 516 U.S. 152 (1996)	6, 9, 17, 19
Bob Evans Farms v. NLRB, 163 F.3d 1012 (7th Cir. 1998)	7
Bowen v. Georgetown Hospital, 488 U.S. 204 (1988)	16-17
Bragdon v. Abbott, 118 S. Ct. 2196 (1998)	15
Central Midwest Interstate Low-Level Waste Commission v. Pena, 113 F.3d 1468 (7th Cir. 1997)	13
Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	*passim*
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	18
Electromation v. NLRB, 35 F.3d 1148 (7th Cir. 1994)	2
Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170 (3d Cir 1995), *cert. denied*, 516 U.S. 1093 (1996)	13
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	9, 16
Herman v. Nationsbank Trust Co., 126 F.3d 1354 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 54 (1998)	13
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	8
Jacks v. Crabtree, 114 F.3d 983 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1196 (1998)	13
Jaramillo v. INS, 1 F.3d 1149 (11th Cir. 1993)	10
Kienast v. Frank, 1990 WL 711359 (EEOC Mar. 27, 1990)	22
Marbury v. Madison, 5 U.S. 137 (1803)	7
Martin v. OSHRC, 499 U.S. 144 (1991)	15
Massachusetts v. FDIC, 102 F.3d 615 (1st Cir. 1996)	13
NLRB v. Town & Country Electric, Inc., 116 S. Ct. 450 (1995)	20
NLRB v. Winnebago Television Corp., 75 F.3d 1208 (7th Cir. 1996)	20

TABLE OF AUTHORITIES—Continued

	Page
Pierce v. Underwood, 487 U.S. 552 (1988)	7
Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993)	12
Reno v. Koray, 515 U.S. 50 (1995)	15
Shalala v. Guernsey Memorial Hospital, 514 U.S. 87 (1995)	15
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	5, 15, 19
Southern Ute Indian Tribe v. AMOCO Product Co., 119 F.3d 816 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999)	6, 12, 13, 14
Washington v. HCA Health Services, 152 F.3d 464 (5th Cir. 1998), *petition for cert. filed*, No. 98-1365, 67 U.S.L.W. 3561 (Dec. 2, 1998)	13, 20
Webcor Packaging, Inc. v. NLRB, cert. denied, 118 S. Ct. 1035 (1998)	2

DOCKETED CASES

Chelsea Indus., Inc., No. 7-CA-36846 (NLRB)	2

STATUTES

Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*	
5 U.S.C. § 553(b)(3)(A)	11
5 U.S.C. § 553(b)(3)(B)	12
5 U.S.C. § 706	7
The Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*	
42 U.S.C. § 12102	16
42 U.S.C. §§ 12111-12116	16
42 U.S.C. § 12116	16
Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*	21
U.S. Const. Art. III, § 1	11

REGULATIONS AND ADMINISTRATIVE MATERIALS

29 C.F.R. App. § 1630.2(j)	22

TABLE OF AUTHORITIES—Continued

	Page
29 C.F.R. App. § 1630.2(*l*)	22
56 Fed. Reg. 8578-8603 (1991)	17, 18, 19, 21
56 Fed. Reg. 35726-35756 (1991)	17, 18, 19, 20
MISCELLANEOUS	
Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Adm. L. Rev. 363 (1986)	6, 16, 20
Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise (1998 Supp.)	12, 15
EEOC Compliance Manual (1992)	22
EEOC, A Technical Manual Assistance Manual on Title I of the ADA (1992)	22
The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961)	11
The Federalist No. 79 (Alexander Hamilton) (Clinton Rossiter ed., 1961)	11
Daniel V. Yager & Joseph J. LoBue, *Is the Chevron Deference Standard Too High-Octane for the N.L.R.B.?*, 23 Empl. Rel. L.J. 67 (Spring 1998)	16
Webster's New World Dictionary (2d ed.)	4

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BRIEF *AMICUS CURIAE* OF LPA, INC., IN SUPPORT OF RESPONDENT

LPA respectfully submits this brief *amicus curiae* with the consent of all parties.[1] The brief contends that the EEOC interpretive rule at issue in this case should not be accorded deference under the *Chevron* doctrine and therefore supports the position of Respondent with respect to that question. The brief does not address any other questions for which certiorari was granted.

[1] Counsel for *amicus curiae* LPA authored this brief in its entirety. No person or entity other than the LPA made a monetary contribution to the preparation of the brief.

INTEREST OF THE *AMICUS CURIAE*

LPA, formerly the Labor Policy Association, is an organization of the senior human resources officers of over 250 of the nation's largest private sector employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development of laws and policies relating to employment. LPA's mission is to ensure that laws and policies affecting labor relations in the private sector are sound, practical, and responsive to the realities of the modern workplace.

Because of its interest in the development of the nation's labor laws, LPA has participated as *amicus curiae* on many labor law issues in cases before this Court, the United States Courts of Appeals, and various federal agencies.[2]

All of LPA's members are employers subject to the jurisdiction of numerous federal agencies such as the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), the U.S. Department of Labor Wage and Hour Division, and the Equal Employment Opportunity Commission. Many, if not all, of these agencies routinely issue "interpretive rules" designed to guide enforcement personnel in the execution of their duties. Often, as is the case here, these interpretive rules are presented to the courts to aid in the interpretation of federal statutory terms. LPA, therefore, is greatly concerned about one of the questions presented in this

[2] *E.g. Webcor Packaging, Inc. v. NLRB, cert. denied,* 118 S. Ct. 1035 (1998); *Electromation v. NLRB,* 35 F.3d 1148 (7th Cir. 1994); *Chelsea Indus., Inc.,* No. 7-CA-36846 (NLRB) (decision pending).

case—the level of deference that should be accorded agency interpretive rules.

STATEMENT OF THE CASE

The facts of the case are set out in Respondent's Brief.

SUMMARY OF ARGUMENT

This brief addresses only one issue for which certiorari was granted in this case—the extent to which the Court should defer to EEOC's Interpretive Guidance. Contrary to the contentions of Petitioners and their *amici*, the EEOC guidance should not be governed by the *Chevron* doctrine.

This Court has established two separate and distinct lines of cases on the question of deference to agency actions, the *Chevron* line and the *Skidmore* line. These two doctrines are significantly different in both nature and form. The *Chevron* doctrine is based on authority—that the issue in question is, in the first instance, for the agency to decide. The *Skidmore* doctrine, on the other hand, is based on persuasion—that the issue is for the courts to decide but deference nonetheless may be appropriate based on other factors that lend merit to the agency's position.

Because of this distinction, the *Chevron* doctrine applies only to agency public policy determinations—*i.e.* those instances where the agency acts to make the policy choices that have not been addressed by Congress. This view of *Chevron* is virtually compelled by the Administrative Procedure Act (APA), which directs that the courts decide all questions of law, and is firmly supported by both the text and reasoning of the *Chevron* decision itself. The *Skidmore* doctrine applies to agency interpretations of law:

where the issue remains with the court to decide; but where the court properly may be persuaded to defer where relevant extrinsic factors lend weight to the agency's view.

When an agency acts through "interpretive" rules, it acts neither in its public policy making capacity, nor through the important public policy making procedures of the APA. As such, interpretive rules can only be construed as involving questions of law, subject not to *Chevron*, but to the *Skidmore* line of cases. The EEOC Interpretive Guidance at issue in this case, as distinguished from the agency's substantive regulations, clearly is an exercise of the agency's law-interpreting, rather than public policy making function. As a result, the guidance is subject to review under *Skidmore* rather than *Chevron*.

Finally, applying the relevant *Skidmore* factors to the particular EEOC interpretation at issue in the case, it becomes clear that the rule is entitled to only minimal deference from the Court.

ARGUMENT

I. THE TYPE AND LEVEL OF DEFERENCE THAT SHOULD BE ACCORDED AN AGENCY DETERMINATION SHOULD DEPEND ON WHETHER THE AGENCY IS ENGAGED IN DECIDING QUESTIONS OF PUBLIC POLICY OR QUESTIONS OF LAW

Webster's dictionary defines the term "deference" as "a yielding in opinion, judgment, wishes." Webster's New World Dictionary 370 (2d ed.). When a court accords an agency determination "deference," it yields to the agency's judgment on a question that it might otherwise have decided differently. This Court, however, has established two separate and distinct lines of cases on the deference issue—the *Chevron* line and the *Skidmore* line.

In *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court adopted, in the legislative rulemaking context, a two part test for judicial review of agency regulations:

> First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), however, in the context of an agency interpretive rule, the Court announced a fundamentally different type of deference:

> We consider the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning,

> its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

As one can see, the *Chevron* and *Skidmore* doctrines are significantly different in nature and form: *Chevron* is based on authority—*i.e.* the question is for the agency to decide within a realm of answers permissible under the statute; whereas *Skidmore* is based on persuasion—*i.e.* the question is for the courts to decide, however, deference may nonetheless be appropriate based on *relevant extrinsic* factors that go to the merit of the agency's position. *See Atchison, Topeka, and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 445-46 (7th Cir. 1994) (Easterbrook, J., Posner, C.J., and Manion, J., concurring).

This authority/persuasion distinction is crucial as it provides the foundation for a consistent application of the two doctrines: authority deference applies when the agency has made public policy determinations; while persuasion deference applies where the agency has decided questions of law. Ignoring the distinction, on the other hand, "breeds confusion." *Id. See also Southern Ute Indian Tribe v. AMOCO Prod. Co.*, 119 F.3d 816, 833 n.24 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999). Moreover, as Justice Breyer has observed, treating deference as a unitary concept can lead courts to give more weight to an agency's legal arguments than to its public policy decisions, thereby reversing the proper roles of the political and judicial branches. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 364-65 (1986).

A. The *Chevron* Doctrine Should Apply Only to Agency Public Policy Determinations

That the *Chevron* doctrine applies only to agency public policy determinations, rather than agency determinations of law, is supported on many levels.

First, it is a well-settled and fundamental principle that Article III courts decide all questions of law. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). Furthermore, Section 706 of the Administrative Procedures Act (APA) makes it clear that, in the administrative law context, the "reviewing court," not the various agencies, "shall decide all relevant questions of law." 5 U.S.C. § 706. Indeed, it is questionable whether Congress could have delegated such a function to the executive, as it does not possess such a power itself. "It is the function of the courts and not the legislature . . . to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988).

The *Chevron* doctrine does not alter this fundamental principal. On the contrary, by its very terms, the *Chevron* doctrine is based on the proposition that there *is no law to apply*. In certain instances, Congress intentionally or inadvertently has not created law in a particular area—that is to say, Congress has not made the relevant public policy choice. In *some* of those instances, Congress has authorized administrative agencies to do so by granting the agency rulemaking power. It is this public policy making function of the agencies that is governed by *Chevron*. *See, e.g., Bob Evans Farms v. NLRB*, 163 F.3d 1012, 1019 (7th Cir. 1998) (refusing to apply *Chevron* to

an NLRB legal determination that did not "involve policy choices or rulemaking in the legislative sense").

This view of *Chevron* is supported on many levels. First, it is virtually compelled by the language of the APA, which in no uncertain terms assigns resolution of questions of law to the judiciary. Moreover, this view of the *Chevron* doctrine is supported by the text of the *Chevron* decision itself. The *Chevron* Court concluded that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress *had an intention* on the precise question at issue, *that intention is the law* and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987).

In those circumstances, it is the duty of the judiciary to ensure the law is found and applied. It is not enough that the agency has supplied a "permissible" rule of law. However, if Congress had *no intention*, there exists *no law* to find and apply. Under those circumstances, agencies with rulemaking power can make the public policy choices not addressed by Congress, provided that those choices are otherwise "permissible" (*i.e.*, not arbitrary, capricious, or contrary to the statute).

Throughout the *Chevron* decision, the Court consistently conditioned the appropriateness of *Chevron* deference on the absence of existing law.

> If, however, the court determines Congress has *not directly addressed* the precise question at issue . . .
>
> If Congress has explicitly *left a gap* for the agency to fill . . .

> [T]he Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress *did not actually have an intent* . . .
>
> [I]t is entirely appropriate for [the agency] to make such policy choices—resolving the competing interests which *Congress itself either inadvertently did not resolve, or intentionally left to be resolved* by the agency . . .

Chevron, 467 U.S. at 843, 844, 845, 865-66 (emphasis added). Thus, by its own terms, the *Chevron* doctrine applies to questions of public policy, not law.

That *Chevron* applies only to agency public policy determinations likewise is supported by the important requirement that an agency possess rulemaking power before invoking *Chevron*. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990). The *Chevron* doctrine applies only where the agency has rulemaking power. *Chevron*, 467 U.S. at 843-44; *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Atchison, Topeka & Sante Fe Ry.*, 44 F.3d 437, 441-42 (7th Cir. 1994) (en banc), *aff'd on other grounds*, 516 U.S. 152 (1996). Absent such public policy making power, an agency's views are entitled to only *Skidmore* (*i.e.* persuasiveness) deference. *General Elec. Co.*, 429 U.S. at 141-42. Conditioning the availability of *Chevron* deference on the presence of agency public policy making authority further supports the position that that doctrine applies only to agency public policy choices.

Finally, this view of *Chevron* is supported by the Court's important discussion of the distinction between the apolitical judicial department and the policially-accountable executive branch. Quite clearly, the Court reasoned in *Chevron* that deference to the agency was appropriate in that case because the executive, as a political branch of government, was accountable to the people. As the Court explained:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 866. In short, in *Chevron*, the "Court admonished courts not to forget to whom the authority and responsibility for . . . policy-making is entrusted." *Jaramillo v. INS*, 1 F.3d 1149 (11th Cir. 1993).

This reasoning is viable, but only if the issue in question concerns public policy choices, a task which the federal system has always entrusted to the politically accountable branches of government. An equally strong facet of the Constitutional scheme, however, is that it purposefully removes from the reach of the political branches the application of existing law, and places that duty in the hands of an *independent* judicial branch.[3] Indeed, the framers of the Constitution apparently were so fearful of placing the application of existing law in the hands of a politically accountable body that they went to great lengths to ensure that the judiciary was independent of political influence.[4] Thus, here again, the Court's reasoning in *Chevron* can support only the conclusion that the *Chevron* doctrine is limited to the agency's *public policy* making function.

B. The *Chevron* Doctrine Should Not Apply to Agency Interpretive Rules, General Statements of Policy, or Rules of Agency Organization, Procedure, or Practice

The *Chevron* doctrine should not apply to agency interpretive rules, general statments of policy, or rules of agency organization, procedure, or practice (collectively "interpretive rules"). This is because these forms of agency action—specifically exempted from the notice and comment requirements of the APA, 5 U.S.C. § 553(b)(3)(A)—do not constitute agency *public policy* determinations.

The distinction between agency public policy determinations (*i.e.* "legislative" rules) and "interpre-

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[3] *See* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (independence of the judiciary is an "excellent barrier to the enchroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.").

[4] *See* U.S. Const. Art. III, § 1 (providing life tenure with no diminution of pay for federal judges). *See also* The Federalist No. 73, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (necessity for life tenure); *Id.*, No. 79, at 472 (necessity for fixed pay).

tive" rules is a distinction of substance, not form. Legislative rules are definitive public policy choices intended by the agency to bind the agency, the courts and the public at large. Such rules generally have to be *adopted through* the political process—*i.e.* the notice and comment procedure—and are at all times *subject* to that political process in that they cannot be altered merely at the discretion of the agency. *Southern Ute Indian Tribe v. AMOCO Prod. Co.*, 119 F.3d 816, 833 n.23 (10th Cir. 1997), *citing* Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise § 6.2, at 228 (3d ed. 1994).[5] In this way, legislative rules not only are binding on the public but also *enforceable against the agency. Id.* Moreover, because of their authoritative nature, such rules generally can be challenged in the courts before they are applied to a particular case. *Id.*[6]

Interpretive rules, on the other hand, are not subject to the public policy making constraints of the APA. These rules, therefore, cannot constitute agency public policy decisions, but rather, merely reflect the agency's interpretations regarding questions of law.

[5] There are some rare and limited exceptions to this requirement, however, such as where notice and comment would be impracticable or contrary to the public interest. 5 U.S.C. § 553(b)(3)(B).

[6] *See, e.g., Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 (1993) ("The promulgation of the challenged regulations present plaintiffs with the immediate dilemma to choose between complying with the *newly imposed*, disadvantageous restrictions and risking serious penalties for violation.") (emphasis added). The operative concept here is that agency public policy determinations *create* "newly imposed" restrictions. Agency interpretations of law simply explain the restrictions that already exist within the statute.

These rules are not subject to pre-enforcement challenge, and may be altered at the discretion of the agency.

For these reasons, the majority of courts of appeals to directly confront this issue hold that agency interpretive rules are not entitled to the *Chevron* deference. *Cent. Midwest Interstate Low-Level Waste Comm'n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997) ("we do not apply *Chevron's* "rubber stamp" to interpretive rules"); *Jacks v. Crabtree*, 114 F.3d 983, 985 n.1 (9th Cir. 1997) (*Chevron* applies to legislative rules, not policy guidance), *cert. denied*, 118 S. Ct. 1196 (1998); *Southern Ute Indian Tribe v. AMOCO Prod. Co.*, 119 F.3d 816, 833 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999); *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996) (policy pronouncements less formal than legislative rules "are not accorded full *Chevron* deference"); *Washington v. HCA Health Services*, 152 F.3d 464, 469 (5th Cir. 1998), *petition for cert. filed*, No. 98-1365, 67 U.S.L.W. 3561 (Dec. 2, 1998).[7]

As the Ninth Circuit explained, such rules "are entitled to less deference than published regulations because they are not promulgated *subject* to the rigors of the Administrative Procedure Act, including public notice and comment, and 'are merely internal guidelines [that] may be altered by the [agency] at will.'" *Jacks v. Crabtree*, 114 F.3d at 985 n.1 (em-

[7] *But see Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1363-64 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 54 (1998); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

phasis added, citations omitted). The Tenth Circuit explained the danger of according *Chevron* deference to agency interpretive rules as follows:

> [A] practice of routine acceptance for interpretations expressed in [informal] formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats. And since these formats are exempt from APA public participation requirements, *an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when applied to them.*

Southern Ute Indian Tribe, 119 F.3d at 833 (emphasis in original), *quoting* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 4 (1990). Indeed, applying the *Chevron* doctrine to interpretive rules not subject to the APA rulemaking strictures would render those requirements nugatory, as agencies could issue, rescind, or reverse *binding* mandates on nothing more than the political whims of the administrators.

For organizations such as LPA and its members, such a rule of judicial deference would be highly troubling. LPA member companies are highly regulated by numerous federal agencies. The APA rulemaking procedure provides such companies the only available avenue to help shape public policy choices that will greatly affect their operations. The absence of strict adherence to that requirement by the agencies and courts undoubtedly will lead to regulation by

ambush. Based on these considerations, "the better-reasoned opinions" hold that interpretive rules are not entitled to *Chevron* deference. Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise § 3.5 at 55 (1998 Supp.).

This Court, while not expressly holding *Chevron* inapplicable to agency interpretive rules, has nonetheless generally taken that approach. *See, e.g., Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules . . . do not have the force and effect of law, and are not accorded that weight in the adjudicatory process"); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (interpretive rules should be shown "some" deference); *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) ("Although not entitled to the same deference as norms that derive from the exercise of the Secretary's lawmaking powers, [interpretive rules] are still entitled to some weight on judicial review."); *Skidmore*, 323 U.S. at 140. Although, on certain occasions, the Court has cited *Chevron* in such cases in *dictum*. *See Koray*, 515 U.S. at 61; *Bragdon v. Abbott*, 118 S. Ct. 2196, 2209 (1998).[8]

The Court should use this opportunity to definitively rule that the *Chevron* doctrine applies only to

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[8] In both of these cases, the Court decided that the agency's interpretation was the "best" interpretation of the statute, therefore its citation to *Chevron* was clearly dictum. Moreover, in *Koray*, *Chevron* apparently was cited only for *Chevron* step one—that the agency interpretation may be considered where it is "permissible" (*i.e.* where the statute is ambiguous). *Koray*, 515 U.S. at 61. With regard to the type of deference due, however, the Court cited only *Skidmore*-line cases. *Id.*

agency public policy determinations, not interpretive rules.[9]

II. THE *CHEVRON* DOCTRINE SHOULD NOT APPLY TO THE EEOC INTERPRETIVE GUIDANCE AT ISSUE IN THIS CASE

In issuing the interpretive guidance in question in this case, EEOC unquestionably intended merely to interpret existing law, not to exercise its public policy making power. Accordingly, the agency's guidance is not entitled to *Chevron* deference.

As a preliminary matter, we note that this necessarily must be so, because EEOC lacks the power to make public policy choices in this area. Congress granted EEOC rulemaking power only with respect to "Title I" of the ADA. 42 U.S.C. § 12116 (giving EEOC regulatory authority over 42 U.S.C. §§ 12111-12116). The statutory term that the interpretative rule here purports to define, however—the definition of "disability"—is not contained within Title I of the Act. *See* 42 U.S.C. § 12102. Thus, strictly speaking, EEOC could not exercise a public policy making function on this particular issue, and its guidance necessarily must be considered interpretive. *See General Electric Co. v. Gilbert*, 429 U.S. at 141; *Bowen v.*

[9] The law/public policy distinction in the deference context is an important issue that should be addressed by the Court. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Adm. L. Rev. 363 (1986). Moreover, the issue has significance for the public in general, and employers in particular, well beyond the narrow impact of the EEOC interpretive rule at issue here. For a detailed look at the law/public policy distinction in the context of NLRB adjudications, *see* Daniel V. Yager & Joseph LoBue, *Is the Chevron Deference Standard Too High-Octane for the NLRB?*, 23 Empl. L.J. 67 (Spring 1998).

Georgetown Hosp., 488 U.S. 204, 208 (1988); *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d at 440.

Nevertheless, even if EEOC was competent to exercise such power on this issue, the agency did not do so here. This is clearly evident from both the label attached to the rules by the agency—*i.e.* "interpretive guidance"—as well as from the circumstances of their issuance. For example, EEOC issued its "interpretive guidance" at precisely the same time it issued its "substantive regulations." *See* 56 Fed. Reg. 8578-8603 (1991); 56 Fed. Reg. 35726-35756 (1991). Yet EEOC consistently treated the two sets of rules as separate and distinct. *See* 56 Fed. Reg. 8578 (1991) (EEOC's notice of proposed rulemaking indicated that the Commission was "*also* issuing interpretive guidance") (emphasis added); 56 Fed. Reg. 35726 (1991) ("The Commission is *also issuing interpretive guidance concurrently with* the issuance of part 1630.") (emphasis added).

Moreover, EEOC consistently made the purpose of the guidance clear:

> The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 in order to ensure that qualified individuals with disabilities understand their rights . . . . [The guidance] represents the Commission's *interpretation* of the issues discussed, and the Commission will be *guided* by it when resolving charges of employment discrimination.

56 Fed. Reg. 35726 (1991) (emphasis added); 56 Fed. Reg. 8578 (1991). Thus, the EEOC rules are paradigmatic "interpretive rules," which are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it ad-

ministers." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

Most importantly, however, the EEOC guidance exhibits none of the indicia of legislative rulemaking. The agency expressed no intent to bind the public or the agency by this guidance. On the contrary, EEOC expressly stated that it would merely be "guided" by the rules in "resolving charges of discrimination." 56 Fed. Reg. 35726 (1991). Indeed, EEOC made clear that it had no intent to be bound by the interpretations, explicitly stating that it intended to issue "more detailed" guidance—not published for notice and comment—in the future. See 56 Fed. Reg. 35726 (1991).[10] Such intentions do not make this guidance subject to pre-enforcement challenge, nor do they preclude the agency from altering its position at will. As a result, the EEOC interpretive guidance cannot be construed as legislative in any sense, and should not be accorded deference under *Chevron*.[11]

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[10] This guidance—issued in the form of EEOC compliance and technical assistance manuals—apparently was never actually published for comment, and comment on this "forthcoming" guidance was invited only with respect to three issues—insurance, workers' compensation, and collective bargaining. *See* 56 Fed. Reg. 8578-79 (1991).

[11] Petitioners and the United States as *amicus curiae* argue that the interpretive guidance should be governed by *Chevron* because it was "subject to the same notice and comment as the regulations." This contention is both irrelevant and incorrect. It is irrelevant because notice and comment is simply a prerequisite to legislative rulemaking, as explained above, it is not determinative on the question. The contention is also incorrect because the agency did not invite comment on the interpretive guidance in general but merely on one section of the guidance, the definition of "regarded as." 56 Fed. Reg. 8578 (1991). Indeed, the particular interpretive rule at issue

III. THE EEOC INTERPRETIVE RULE AT ISSUE IN THIS CASE DESERVES LITTLE DEFERENCE UNDER THE *SKIDMORE* DOCTRINE

Because, as demonstrated above, EEOC's interpretive guidance is simply an attempt to interpret statutory terms rather than an exercise of the agency's policy making function, the questions addressed in that guidance are questions of law for the courts to decide. Thus, any deference given to those interpretations must be *Skidmore*-type deference.

As noted above, *Skidmore* deference is based on the presence (or absence) of merit factors that are extrinsic to the agency's legal interpretation, but nonethe less are relevant to the proper interpretion of the law. The essence of the *Skidmore* doctrine is that the court must be persuaded to yield to the agency's view. *Skidmore*, 323 U.S. at 140.

Among the factors relevant to this inquiry are:

1) the thoroughness in wh ch the agency considered the matter;

2) The validity of the reasoning cited by the agency as justification for the rule; and

3) The consistency of the rule with regard to earlier and later pronouncements of the agency.

Skidmore, 323 U.S. at 140. Other relevant factors identified by the courts have included: contemporaneity with the statute;[12] the circumstances of the

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in this case was not even published for comment at all. *Compare* 56 Fed. Reg. 8593 (1991) *with* 56 Fed. Reg. 35741 (1991).

[12] *Atchison, Topeka & Santa Fe Ry. Co.*, 44 F.3d at 445 (Easterbrook, C.J., concurring) ("a legal interpretation

rule's promulgation;[13] technical expertise or experience possessed by the agency that is relevant to the issue in question;[14] and the extent to which the agency can be trusted.[15]

Under these standards, the EEOC guidance does not fare well. First and foremost, the thoroughness and validity of the agency's reasoning fails egregiously. As the agency's Section-by-Section Analysis of Comments and Revisions makes clear, the only justification offered by the agency for adopting the rule at issue in this case was as follows:

> The[] revision[] responds to comments from disability rights groups that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or corrective measures.

While the agency stated that its rule purportedly was consistent with some of the legislative reports, EEOC nonetheless gave no reason for adopting the rule other than pressure from interests groups. 56 Fed. Reg. 35728.

While such a rationale is permissible, and perhaps expected, in the public policy context, pressure from

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adopted soon after the statute's enactment may be the best evidence of the meaning the words carried in the legal profession at the time").

[13] *Washington*, 152 F.3d at 470.

[14] *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995) (citing the NLRB's special "understanding of labor relations"); Breyer, *supra* at 370-71.

[15] *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208 (7th Cir. 1996) ("The fact is that 'an administrative agency, like any other first-line tribunal, earns—or forfeits—deferential judicial review by its performance.'"); *Breyer, supra* at 371.

interest groups simply has no relevance in the proper interpretation of existing law. That is to say, a court should not be *persuaded* of the propriety of a legal interpretation simply because it was adopted to satisfy interest groups. On the contrary, such reasoning can lead one only to conclude that the agency reached its conclusion for the wrong reason. Because EEOC gives no other reason for its rule, both the thoroughness and validity factors clearly weigh against according deference.

The consistency of interpretation factor also weighs against deference in this case. United States as *amicus curiae* contends that EEOC has maintained a consistent position on the question at issue here—that "substantially limits" is evaluated without respect to corrective measures. This contention is simply untrue. Indeed, the agency's very first interpretation of the statutory provisions at issue here did not purport to make such a rule. In fact, the original EEOC guidance implied just the opposite—that "substantially limited" must be determined "on a case-by-case basis." 56 Fed. Reg. 8602 (1991). *See also* 56 Fed. Reg. 8594 (1991) ("The determination of whether an individual has a disability is not based on the name or diagnosis of the impairment the person has, but rather the effect of that impairment on the life of the individual.")[16] Similarly, the agency's

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[16] EEOC's original guidance followed its interpretation of the same question under the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*, another "earlier pronouncement" that likewise is inconsistent with the agency's present interpretive rule

> In the present case, it is undisputed that appellant has a vision impairment which requires her to wear corrective lenses. Appellant does not claim that her vision problems were not fully corrected by wearing the lenses. *Conse-*

present interpretive guidance is not even internally consistent on this point, indicating in several places that mitigating measures should be considered. *See, e.g.*, 29 C.F.R. App. § 1630.2(*l*) (an "individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment. For example: an employee has *controlled* high blood pressure which *does not substantially limit his work activities* . . . .); 29 C.F.R. App. § 1630.2(j) (The determination of substantially limited is based "on the effect of th[e] impairment on the life of the individual.")

Finally, the EEOC interpretive rule at issue in this case is inconsistent with the agency's later pronouncements. *See, e.g.*, EEOC, A Technical Manual Assistance Manual on Title I of the ADA, § 2.2(c)(1) (1992) (restating the controlled high blood pressure example); EEOC Compliance Manual § 902.4 (The substantially limited "analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting for that individual.") Thus, the consistency factor also weighs against a finding of deference in this case.[17]

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quently, we find that appellant was *not substantially limited* in an of her major life activities . . .

Kienast v. Frank, 1990 WL 711359, at *6 (EEOC Mar. 27, 1990) (emphasis added).

[17] With regard to the other relevant factors noted above, only one—the circumstances of the rule's promulgation—requires significant comment. The interpretive rules at issue in this case are published in the Code of Federal Regulations. As such, the rules deserve more serious consideration by the courts than less formal interpretations issued by the agency, such as internal memoranda or *amicus curiae* briefs. Moreover, the interpretive guidance in general was published for at least some comment. That the agency asked for, and received, input from interested parties also should be looked upon favorably by the courts. The importance of this factor *in this particular case*, however, is greatly reduced because EEOC did not publish the particular rule at issue here for comment. While on balance the "circumstances of promulgation" factor weighs slightly in favor of deference, it does little to tip the scales in light of the other *Skidmore* factors. The three remaining factors, contemporaneity, expertise and trust, all have little relevance to the question presented here. The ADA, passed in 1990, is a very recent act. The Court, therefore, has a full appreciation of the meaning of the words chosen in the statute. Likewise, the issue presented is a question of pure statutory construction that requires little, if any, technical or specialized knowledge. Thus, the Court is equally if not better suited to resolve this question than EEOC. Finally, there is no indication that EEOC has acted inappropriately, therefore, the trust factor also is inapplicable.

In light of all the relevant *Skidmore* persuasion factors, it is clear that the EEOC interpretive rule at issue in this case deserves minimal deference from the Court.

CONCLUSION

For the foregoing reasons, LPA respectfully submits that the *Chevron* doctrine should not apply to the EEOC Interpretive Guidance and the Court should accord the guidance only minimal deference under *Skidmore*.

Respectfully submitted,

DANIEL V. YAGER *
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae LPA, INC.

* Counsel of Record